

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 JOHN KARPINSKI, CLARK COUNTY NATURAL
4 RESOURCES COUNCIL and FUTUREWISE,

5 Petitioners,

6 v.

7
8 CLARK COUNTY,

9 Respondent,

10 And

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12 GM CAMAS, L.L.C., JOHNSTON DAIRY, et al and
13 MACDONALD PROPERTIES, DARYL GERMANN,
14 CURT GUSTAFSON, T3G, LLC, HINTON
15 DEVELOPMENT CORPORATION, BUILDING
16 INDUSTRY ASSOCIATION OF CLARK COUNTY
17 AND CITY OF LA CENTER,

18 Intervenor.

Case No. 07-2-0027

**ORDER DENYING MOTIONS FOR
RECONSIDERATION**

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21 THIS Matter comes before the Board on what it views as Clark County's (County) and La
22 Center's (La Center or City) requests for reconsideration of the Board's August 6, 2009
23 Order Granting Limited Stay of Compliance Proceedings.¹ That Order stayed compliance
24 proceedings in regards to certain areas of noncompliance but continued the Determination
25 of Invalidity. This Order maintains the Determination of Invalidity in regards to the following
26 areas of agricultural lands which the County de-designated and added to the urban growth
27 areas of the referenced Clark County cities:

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29 LB-1 La Center
30 LB-2 La Center
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32 ¹ La Center's Opposition to the Board's Order Granting Limited Stay of Compliance Proceedings, filed August 13, 2009; Clark County's Response to Petitioners' Objection to Compliance Report, filed August 14, 2009.

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1 Board limited the stay to the findings of non-compliance and continued the previously issued
2 Determination of Invalidity.

3 4 II. DISCUSSION

5 As noted in the Board's August 6 Order, although the GMA does not directly authorize the
6 Board to issue stays the Administrative Procedures Act (APA) provisions apply to the
7 practice and procedure of the Boards, with RCW 34.05.550(1) explicitly providing for stays.⁸
8 The Board further notes that RCW 34.05.550(1) allows an agency to grant a stay *in whole or*
9 *in part*.⁹ Therefore, granting a limited stay was well within the Board's ability.

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12 La Center and the County filed responses by which they objected to the continuation of the
13 Board's invalidity determination for areas LB-1, LB-2, LE, VA, VA-2, and WB.¹⁰ La Center
14 urges the Board to "withdrawal (sic), revise, or clarify" its order such that the Determination
15 of Invalidity would not be maintained.¹¹ The County similarly requested the Board to
16 "supersede" its earlier order continuing invalidity.¹² Both La Center and the County base
17 their requests on the fact Clark County Superior Court issued an order reversing the Board
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21 ⁸ It should be noted that the effect of a Stay is to merely provide for abeyance of the compliance proceedings.
22 A Stay issued by the Board does not bring the County into compliance on those issues under appeal. It
23 means only that the County does not have to take any legislative action until such time as a final decision is
24 rendered by the Court. Similarly, if the Board were to stay invalidity it does not remove invalidity but
25 temporarily suspends the need for the County to act. In sum, during the pendency of an appeal subject to a
26 stay, the County remains in a non-compliant, invalidity status.

27 ⁹ RCW 34.05.550(1) provides: Unless precluded by law, the agency may grant a stay, in whole or in part, or
28 other temporary remedy.

29 ¹⁰ La Center's Response To Clark County's Compliance Report and Opposition To The Board's Order
30 Granting Limited Stay of Compliance Proceedings; Clark County's Response To Petitioner's Objection To
31 Compliance Report.

32 ¹¹ La Center's Opposition, at 5. La Center cites *Pierce County v. State*, 144 Wash. App. 783 (2008) for the
general proposition that an administrative agency is under a legal obligation to comply with a superior court
order. That decision involved, inter alia, a claim alleging the Department of Social and Health Services failed
to comply with statutory requirements regarding services to homeless children. Declaratory and injunctive
relief was granted by the trial court requiring the department to comply with statutory obligations, rejecting an
argument that the court's interference violated the separation of powers doctrine. The *Pierce County* decision
is clearly distinguishable. Here, a decision was entered by the Board, reversed (in part) by the Superior Court,
and subsequently appealed to the Court of Appeals; an appeal which is still pending.

¹² County's Response, at 4

1 in regards to these six areas. Because of the court's ruling, La Center contends the Board
2 lacks authority to "reinstate, reassert, or maintain" invalidity without non-compliance and,
3 therefore, the August 6 Order is inconsistent with the Superior Court to the extent it
4 maintains findings of non-compliance and invalidity.¹³ Clark County sets forth a similar
5 argument by contending that a finding of noncompliance is a necessary prerequisite to a
6 determination of invalidity.¹⁴ In essence, both La Center and the County argue that the
7 Clark County Superior Court's order is effective and binding despite the pending appeal to
8 the Court of Appeals and the Board must stay both non-compliance and invalidity.
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11 The question posed by La Center and Clark County is two-fold: (1) what is the effect of the
12 Superior Court's Memorandum of Decision and Order, and (2) is the Board required to act
13 upon the Superior Court's Memorandum of Decision and Order while the matter is pending
14 before the appellate court. With the County's original request and the subsequent requests
15 for reconsideration of the Board's August 6 Order, the County and La Center are not simply
16 requesting a stay of the compliance proceedings but are seeking enforcement of the
17 Superior Court's decision.
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19 RCW 36.70A.270(7) authorizes the Boards to adopt rules of procedure and supplements
20 those rules with the provisions of the APA, RCW 34.05. Neither the Board's own rules nor
21 the APA address when an appellate court's decision is effective, therefore replacing a
22 Board's decision; thus reliance on court rules is appropriate.¹⁵ In *Diehl v. Western*
23 *Washington Growth Management Hearings Board*, the Court stated:¹⁶
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28 ¹³ La Center's Opposition, at 4-5.

29 ¹⁴ County's response at 2-4.

30 ¹⁵ See, e.g. *Evergreen Islands, et al v Anacortes*, Case No. 05-2-0016 Compliance Order (April 9, 2007); *1000*
Friends v. Thurston County, Case No. 05-2-0002 Compliance Order (Oct. 22, 2007).

31 ¹⁶ *Diehl v. WWGMHB*, 153 Wn2d 207, 217 (2004). A similar holding can be found in *King County v.*
32 *CPSGMHB*, 91 Wn.App. 1 (1998) (Civil rules are for civil actions invoking general jurisdiction of superior
courts; the Rules of Appellate Procedure (RAP) should be analogized given the appellate jurisdiction of trial
courts under the APA).

1 In reviewing administrative appeals, Washington Courts have stated that it
2 was more appropriate to look to the rules of appellate procedure, rather than
3 the civil rules, given the appellate jurisdiction of the trial court under the APA.

4 The Board sees the decision of the Clark County Superior Court like that of an appellate
5 court and this Board has previously held that the Rules of Appellate Procedure (RAP) may
6 be applied to the status of a growth management hearings board case.¹⁷ Under RAP 12.2,
7 the Superior Court decision does not become effective until a mandate is issued terminating
8 appellate review.¹⁸ In that appellate review in the present matter is currently pending in the
9 Court of Appeals, no mandate can be issued until the Court of Appeals has made its
10 decision. Therefore, the Superior Court decision is not yet effective and binding.
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13 The Board acknowledged with the August 6 Order the Superior Court had reversed the
14 Board and that, therefore, it was appropriate to stay the effectiveness of the Board's AFDO
15 until the subsequent appeal could be resolved. However, since the Board is serving in the
16 capacity of a trial court, pursuant to RAP 7.2 the Board has authority to enforce its decision
17 during the appeal unless a stay has been issued by a reviewing court. Neither the Superior
18 Court nor the Court of Appeals issued a stay in regards to the Board's AFDO. Therefore, the
19 Board's decision remains in effect until a final decision terminating review is entered by the
20 Courts.
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23 Although LaCenter's and the County's arguments differ somewhat, in essence they both
24 contend that the Board's decision must be modified as it was reversed by the Superior
25 Court. However, until review is terminated, the Superior Court decision itself is subject to
26 possible modification. In addition, the Board notes that the purpose of invalidation is to
27 preclude non-GMA compliant development from occurring until such time as the jurisdiction
28 has taken responsive action to remedy its non-compliant action. Given the abeyance
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32 ¹⁷ *Evergreen Islands, et al v. Skagit County*, Case No. 05-2-0016, Compliance Order (April 9, 2007).

¹⁸ See also RAP 12.5 Mandate.

1 afforded Clark County by the August 6 Order, retaining invalidity is appropriate until the
2 issue of compliance has been thoroughly addressed by the courts.

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4 In conclusion, until such time as a mandate terminating review is issued, the Superior
5 Court's decision is not effective and binding upon the Board and the Board maintains the
6 authority to enforce its decision as set forth in the AFDO.

8 III. ORDER

9 For the reasons set forth above, the Board reaffirms its August 6, 2009 Order Granting
10 Limited Stay and its previous Determination of Invalidity for the following areas shall be
11 continued until further order of the Board:

- 12 • LB-1, La Center;
- 13 • LB-2, La Center;
- 14 • LE, La Center;
- 15 • VA, Vancouver;
- 16 • VA-2, Vancouver;
- 17 • WB, Washougal.

18 Dated this 3rd day of September, 2009.

22 _____
23 William Roehl, Board Member

25 _____
26 James McNamara, Board Member

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29 Nina Carter, Board Member

1 Pursuant to RCW 36.70A.300 this is a final order of the Board.

2 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
3 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
4 judicial review may be instituted by filing a petition in superior court according to the
5 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
6 Enforcement. The petition for judicial review of this Order shall be filed with the
7 appropriate court and served on the Board, the Office of the Attorney General, and all
8 parties within thirty days after service of the final order, as provided in RCW
9 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
10 but service on the Board means actual receipt of the document at the Board office
11 within thirty days after service of the final order.

12 **Service.** This Order was served on you the day it was deposited in the United States
13 mail. RCW 34.05.010(19).
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